No. 22537

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUG 1968

In the Matter of

HALDEMAN PIPE & SUPPLY COMPANY, a corporation,
Debtor.

On Appeal From the United States District Court for the Central District of California.

APPELLANT'S REPLY BRIEF.

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I.

There Is No Finding of Fact That Appellant Knew of a Possible Suit by the Receiver Against Manildi, Upon the Filing of His Affidavit for Employment by the Receiver.

1. Appellee's Brief Erroneously Suggests That Appellant Was Found to Have Knowledge of a Possible Cause of Action Against Mr. or Mrs. Manildi at the Time of Filing the Affidavit in Conjunction With His Employment.

An examination of the two briefs previously filed herein show that the parties are in agreement on at least (and almost only) one thing: it is a matter of major importance whether or not appellant knew (or was in a position to be charged with knowledge) that the receiver might have a cause of action against Mr. and Mrs. Manildi.

Appellee is so flat-footedly positive in his repetition of the proposition that one's suspicion is immediately aroused as to its accuracy. At pages 20 and 21 of his brief, his answer to virtually every argument of appellant is that he "knew or should have known" that there existed a "conflict of interest *ab initio*" (see paragraphs 1, 2, 3, 5 and 6.) More specifically, on page 20 (paragraph 2) he states precisely what he means: "Appellant knew, or should have known, (1) that there were possible causes of action in favor of the Receiver against Santa Monica and the Manildis. . . ."

We agree with appellee that such a finding is critical to his case. Mere repetition, however, will not prove his point.

The Referee was much more limited in his findings. He found that on May 31, 1963, "There was in fact, an actual, *if not yet known,* conflict of interest between the receiver, on the one hand, and Amstan, on the other" [Concl. of Law, 1 and Find. 20; emphasis added.]

Clearly, then, the Referee did not find that appellant knew of an actual conflict. To the contrary, he recognizes that it might not be known.

The Referee spelled out what he meant in the next finding and conclusion:

> "[O]n or before June 6, 1963 . . ., Grodberg actually knew, or *should have known,* that his representation of the receiver was then, or *would be, or at least might become,* in substantial conflict with his representation of Amstan." [Find. 21; Concl. 2; emphasis added.]

Thus one of the possible alternative findings (which must justify the order or it is invalid) is that on June 6, 1963, Appellant *should have known* that his representation of the Receiver *might become* in conflict with his representation of Amstan.

As the Opening Brief shows, General Order 44 now contemplates that an attorney may represent a receiver even though he represents a creditor, and the interests of the parties "might become" in conflict, as, for example, where the claim of the creditor is challenged or reexamined.

Furthermore, all of the Appellee's assertions about the status of knowledge of Appellant regarding a claim against Manildi are only that: assertions by appellee, not findings by the Referee. The Referee made it quite clear as to what he found. He said appellant knew these things on June 4, 1963:

1. Grodberg represented Amstan;
2. Amstan held a guarantee from the Manildis up to $100,000.00.
3. Manildi was president of debtor;
4. Manildi was "a principal of Santa Monica".
5. Amstan and Grodberg had discussed a suit by Amstan against Manildi and levies of attachment against his property. [Find. 7.]

The missing link, supplied only by unsupported repetition and italics by appellee is that appellant should have anticipated wrongdoing by Manildi solely because he was "president" of debtor and "a principal" of Santa Monica, and that the wrongdoing was such that it would give the debtor (and hence the Receiver) an ultimate right to levy on Manildi's property.

The Referee clearly avoided making any such finding, and there are no facts in the record to support such speculation.

On the contrary, Mr. Leonard Goldman, the attorney for the debtor and Manildi flatly declared:

> "For the record, there could not have been, in my opinion, the possibility of any outward appearance of any adversity." [Rep. Tr., June 9, 1966, p. 39, lines 21-23.]

Furthermore, the record shows that the Referee did not intend to find that Appellant knew that there might be a cause of action against Manildi. Thus, the Referee specifically states

> "the point I am trying to get at is, what is the effect of representing . . . let's assume for the moment . . . of in fact representing an adverse interest even though you might not know about it? That is what I am getting at." [Rep. Tr., June 9, 1966, p. 41, lines 12-15.]

Again, on this subject, the Referee stated:

> ". . . I think that every intendment should be used, not in favor of the person who at one time or another discovers he has an adverse interest undisclosed to the court, but it should be pursued in the other direction, and I am talking now of the situation today, the order authorizing the employment is filed and there is an affidavit 'I represent no adverse interest'. And two months from now, or three months from now, or some other time it develops as a matter of fact. *Now, don't misunderstand; I am not suggesting a matter of knowledge in the inception,* but as a matter of fact he does represent adverse interests." [Emphasis supplied; Rep. Tr., June 9, 1966, p. 31, lines 4-18.]

Consistent with the foregoing preliminary comments, in making his specific Findings of Fact on the subject of appellant's knowledge, the Court significantly did not find that Appellant had any knowledge of the possibility of a suit by the Receiver against Manildi on the critical dates of May 31, 1963 and June 4, 1963. [All of the specific Findings as respect appellant's knowledge in this regard are set forth in the last sentence of Find. 7, discussed above.]

With respect to the "knowledge" aspect of the matter, General Order 44 is clear. It does not ask the impossible. It simply requires the verified petition for appointment of an attorney for a receiver to set forth the attorney's specified connections "to the best of petitioner's knowledge". It does not demand that such petition or affidavit set forth what the applicant "should have known" or what "would be, or, at least, might become", in the future, but which the Referee apparently requires by Conclusion 2.

It, therefore, is submitted that in the first place, the Finding of Fact actually made with respect to appellant's knowledge, to wit, Finding of Fact 7 referred to above, does not support any Conclusion of Law that there was any knowledge of any actual conflict, in view of the fact that there is no Finding of the existence of an indispensable element requisite to the alleged conflict envisaged, namely, knowledge of the existence of a suit in favor of the Receiver and purportedly in conflict with a suit in favor of Amstan against the same third party. On the contrary, by the omission of such a Finding of Fact, such alleged knowledge must be deemed found not to have existed.

Furthermore, not only is said Conclusion of Law 2 unsupported by the Findings of Fact, but said Conclusion by holding that Appellant "*should have known that his representation* of the Receiver then was, or would be, or, at least, *might become,* in substantial conflict with his representation of Amstan" goes far beyond the express and limited provisions of General Order 44. It engrafts upon the first sentence of General Order 44 requirements not merely of what was actually known "to the best of petitioner's knowledge", but requires sheer speculation as to what one "should have known" as to "what would be, or, at least, might become" in the future.

Finding of Fact No. 7 significantly omits any Finding of any knowledge of a possible cause of action by the Receiver against the Manildis.

In an effort to overcome this defect, and in an obvious attempt to add additional findings of fact which have not been made, Appellee's Brief exaggerates the extent of the "knowledge" actually found by urging this Court to "infer" additional findings from Conclusion of Law 2, either simply because such Conclusion of law was set forth, or because said conclusion of law is also designated as a Finding of Fact, numbered 21. It is erroneous for such additional and unexpressed finding of fact to be so "inferred".

2. Findings of Fact Cannot Be "Inferred" Either From Other Findings of Fact or From Conclusions of Law as Urged by Appellee.

The general proposition that a Referee's findings of fact are to be accepted unless "clearly erroneous" is undisputed as a general rule.

This does not mean, however, that an appellee may infer new findings of fact—not made by the trial court, from its conclusions of law. As this Court pointed out in *Lundgren v. Freeman,* 307 F. 2d 104, 115 (9th Cir. 1962), ". . . courts of appeal need give no weight to a trial court's conclusions of law;" thus "inferences derived from the application of a legal standard" may be disregarded. Similarly, in *Official Creditor's Committee v. Ely,* 337 F. 2d 461, 467 (9th Cir. 1964), this Court held that "conclusions of law, ultimate findings, or mixed findings of fact and law are not binding upon a court of review."

Thus, with respect to the so-called "Findings of Fact" numbered 20, 21, 22, and 23, the same have been exactly repeated and frankly designated by the

Referee and adopted by the District Court as Conclusions of Law numbered 1, 2, 3, and 4, respectively. The trial court here limited its findings of fact with respect to the "knowledge" of the appellant at and before the time of his appointment to those set forth in Finding of Fact 7. So-called Finding of Fact 21, actually a Conclusion of Law, and designated as such as Conclusion of Law 2, is a determination based upon Finding of Fact 7, and such determination is one which, pursuant to the authorities above cited, the reviewing court is neither bound by in any respect, and which it is at full liberty to reject out of hand with the correct conclusion of law of its own.

Appellee's contention that appellant had knowledge, at or before the time of his appointment, of the possibility of a suit in favor of the Receiver and against Manildi, is not based on a finding of fact, but rather on inferences which Appellee itself draws solely from Conclusion of Law 2. [Find. 21.] This not only flies in the face of the Referee's own Conclusion of Law 1 [also designated Find. 20] that there was an allegedly actual "*if not yet known*" conflict of interest as between the Receiver, on the one hand, and Amstan, on the other hand (emphasis supplied), but also of the Referee's significant omission of any such specific finding of ultimate facts in Finding of Fact 7.

3. All "Credible Evidence" Supports the Referee's Position in Refusing to Find Knowledge on the Part of Appellant of a Possible Suit by the Receiver Against Manildi When Appellant Was Appointed Attorney for the Receiver.

As if in the hope that mere reiteration of a contention will make it true, the Appellee's Brief repeatedly claims that "credible evidence" supports a finding that appellant "knew, or should have known" that the Receiver

had or might have had a lawsuit against the Manildis, even before appellant's employment. Upon examination of what Appellee's Brief cites in support thereof, however, it is clear that there is no such "credible evidence" at all. The reference (in Appellee's Br. p. 24) to paragraph E of the Receiver's application to employ appellant as counsel [transcript of record, pp. 10-12, incl.] relates not to matters involving the Manildis individually, but to relationships between the debtor and a related corporation, Santa Monica Plumbing & Supply Company. Likewise, the references to the June 9, 1966 and the November 14, 1966 Transcript, quoted in Appellee's Brief (pp. 25 and 26), again expressly refer to claims not against the Manildis individually, but rather to claims against said corporation, Santa Monica Plumbing & Supply Company. In addition to the fact that claims against a corporate entity, not the Manildis individually, were involved, appellee's brief conveniently omits the qualifying paragraph which immediately precedes the said reference to the June 9, 1966 transcript, which sets the time for the first acquisition of knowledge of the possibility of a conflict.

> "The first time that it seemed to me that a potential conflict might arise insofar as my representation of the Receiver is concerned, was a *result* of investigations which were initiated during the course of the receivership with respect to the interrelations between Haldeman and Santa Monica Pipe & Supply Company, the Santa Monica Company." [Emphasis supplied; appellant's testimony, Rep. Tr., June 9, 1966, p. 10, lines 11-17.]

The mere fact that a receiver may have a creditor's claim against a corporation of which an individual is a "principal" certainly is no basis for *ipso facto* assuming that the receiver necessarily has a lawsuit against such principal individually. But the appellee's brief goes

even further; it apparently contends in all seriousness, that because Item E of the affidavit referred to the examination of witnesses under §21(a), that "it must be held that the contemplated examinations would include an examination of Manildi as the representative of the debtor, and that such examinations properly conducted would inevitably lead to the causes of action in case. No. 825741." (by the *Receiver v. Manildi, et al.*) From this, appellee's brief reasons that appellant must have all along known what the results of such future examinations would be, and therefore, is chargeable before the event with knowledge of such examinations which had not yet occurred.

Of course appellant is not chargeable with what developed on interrogation—which, incidentally, is not in the record. *Furthermore, no one ever established, and this record does not show, that the Receiver had at any time a bona fide claim against Manildi.*

The actual evidence shows appellant had no knowledge of such alleged claim prior to his employment as attorney for the Receiver. Appellant's testimony under the most persistent of cross-examination, was clear that when the Affidavit and Application for his employment was prepared and filed, and for many weeks thereafter, he knew of no facts and had no cause to believe that the Receiver had any possible claim against the Manildis individually.

He did not have information which would cause him to suspect either that the real property standing in Manildi's name was not Manildi's, or that it was subject to any claims against him. [Rep. Tr., June 9, 1966, p. 8, lines 12-18.] Appellant testified that long afterwards, on August 19, 1963, upon the oral report of the accountant Kramer respecting his investigation of the relationship between Haldeman and Santa Monica,

giving rise to what even then were mere "suspicions" in the accountant's mind, that as the result of such investigation, it seemed to him for "the first time" that a potential conflict might arise by virtue of a possible suit against the Manildis individually. [Rep. Tr. June 9, 1966, Hearing, p. 10, lines 11-17.]

Again, at page 12, lines 6 through 10 of said Transcript, he testified:

> "Now the accountant started his investigation. As a result of his investigation, he became suspicious of whether or not not only there had been a diversion of assets from Haldeman to Santa Monica, but questioned the business relationship between Manildi as an individual and Haldeman". [See also, Rep. Tr., June 9, 1966, p. 13, lines 10-15, p. 15, lines 1-8, and p. 51, lines 4-10.]

It has never been shown that the claim became more than "suspicions." The facts were never developed in this record on which the claim and lawsuit were based.

Nevertheless, appellant testified that immediately after the accountant's oral report, Appellant spoke personally with the Receiver and "I put it to him and he agreed with me that I did not know if it was going to develop that there were any claims in favor of the Receiver against Manildi." [Rep. Tr. p. 15, lines 12-15.] Again, the witness testified that he nevertheless then immediately withdrew from representing the Receiver in reference to the Manildis "as soon as I saw what I believed was a potential claim . . . and apparently there was not any claim, in fact." [Rep. Tr. p. 21, line 19, to p. 22, line 3.]

The surrounding facts and circumstances evidence the truth of the assertion that appellant had no knowledge of the possibility of a suit or possible suit against the Manildis individually in favor of the Receiver.

The first day Appellant had ever represented any of the creditors who had been referred to him in connection with the Haldeman case was on May 28, 1963. A mere three days later, namely, May 31, 1963, the Receiver requested appellant to represent him also, and it was on that day that appellant drafted the Attorney Affidavit. Whatever knowledge appellant had concerning the case at the time of drafting the Affidavit was gained during said brief interim period. This knowledge was gained specifically from one telephone call from William Collen, his referring Chicago counsel; two telephone discussions with Leonard Goldman, the attorney representing Haldeman, and also (at that time) Manildi; and one conference in Chambers with Mr. Goldman and the Referee on May 31, 1963, when Mr. Goldman related the general status of the case to appellant and to the Referee. [November 14-December 2, 1966, Rep. Tr. p. 17, line 22, to p. 18, line 14; p. 19, lines 4-24; p. 44, line 1, to p. 45, line 13.] There is no evidence at all that any facts were brought to appellant's knowledge which in any respect would even indicate the possibility of a cause of action or possible cause of action of the Receiver against Mr. and Mrs. Manildi individually, much less that appellant had any knowledge of such. The circumstances of appellant's recent and brief introduction to the case are forceful proof of the absence of such "knowledge".

Although certainly appellant was shortly thereafter apprised that one of his new creditor clients, Amstan, had a claim against Manildi individually arising from a guarantee, this certainly does not mean that he was thereby given any reason at all to believe that the Receiver also had a cause of action or "possible cause of action" against Manildi. Certainly if the Receiver, himself an experienced attorney at law, had given appellant any such knowledge, directly or indirectly, prior to the

time appellant withdrew as the Receiver's counsel in respect to the Manildis upon the making of the accountant's report on August 19, 1963, in such event the Receiver would surely have so testified in these proceedings. It is noteworthy that the Receiver never so testified, and never testified that he placed any information in appellant's hands, directly or indirectly, which would have given knowledge of a possible cause of action by the Receiver against the Manildis.

That appellant had no knowledge of a possible cause of action of the Receiver against the Manildis before the accountant voiced his suspicions on August 19, 1963 is also established by the testimony of Attorney Leonard Goldman, who at the critical times in question represented both the debtor Haldeman and its president, Manildi, individually.

Mr. Goldman made it clear:

> "For the record, there could not have been, in my opinion, the possibility of any outward appearance of any adversity." [Rep. Tr., June 9, 1966, p. 39, line 12, to p. 41, line 7, especially at p. 39, lines 21-23.]

Indeed, Mr. Goldman testified that he himself first learned that there was a possibility of a claim against the Manildis some time in August 1963 when Mr. Kramer came in with his report. [Rep. Tr., Nov. 14, 1966, p. 62, line 17, to p. 63, line 1.]

If the very attorney who actually represented Haldeman and the Manildis at the critical times himself did not know of a cause of action or possible cause of action in favor of the Receiver against the Manildis, it is overwhelmingly clear that appellant with his recent acquaintance with and limited knowledge of the facts of the situation, certainly could not and did not have any prior

knowledge that the Receiver might have a possible cause of action against Manildi.

From the foregoing, it is abundantly clear that the evidence does not in the slightest support the so-called "inferences" which Appellee's brief would draw from the Conclusions of Law.

II.

In Failing to Decide on the Basis of Actual Conflict, and Instead Deciding the Case on the Basis of a Possible Conflict, the Referee and the District Court Held Contrary to Statute, Rule and Precedent.

1. An Attorney's Representation of More Than One Creditor Against the Same Debtor Does Not Ipso Facto Mean That He Is Representing at the Same Time Conflicting Interests.

Appellee's Brief professes the belief that, when appellant points out that there in fact was no conflict of interest that this is now done belatedly. Such is not the case. On the contrary, at the very outset of taking testimony upon the within fee application, the absence of any genuine conflict in fact was stressed. [Rep. Tr., June 9, 1966, p. 4, line 26, to p. 5, line 9; p. 5, lines 16-21.]

Implicit throughout Appellee's Brief, and Conclusions of Law 3 and 4 [also designated, respectively, as Finds. 22 and 23] is the assumption that an attorney representing more than one creditor against the same debtor at the same time *ipso facto* represents conflicting interests. However, conflict is not necessarily inherent in this situation. Indeed, it is common in commercial practice for individual creditors, creditor groups, collection agencies, and/or credit associations to band together and retain the same attorney to prosecute the claims of two or more creditors jointly against

the same individual debtor. This is often done in bankruptcy proceedings particularly. This practice is followed frequently because mutual creditor interests can in this way often be most economically and efficiently advanced. Thus, simply because appellant had been representing Amstan in reference to its claim against Manildi individually did not in and of itself mean that thereafter, when the possibility of the Receiver having a claim against Manildi was suspected by the accountant Kramer in August of 1963, that this meant a conflict of interest necessarily existed between the Receiver and Amstan. Depending upon the facts of the particular case and the facts which might thereafter develop, as *In the Matter of ItemLab,* 257 F. Supp. 764 (E.D. N.Y., 1966) their interests might well have been found concurrent and mutual, not conflicting. Therefore, the lower Court could not infer any knowledge of a conflict solely from the relationship of the parties.

The attachment levied by appellant on behalf of Amstan against the Manildis does not show that the appellant acted against the interests of the receiver. That attachment was levied shortly after June 10, 1963 [Find. 9], long before suspicion of a possible claim by the Receiver against the Manildis arose. The fact that the lower Court concluded [Concl. 4] that this attachment "reduced, and militated against" the Receiver's enforcement of "any claim or cause of action he may have had against the Manildis" is therefore irrelevant.

Further, said conclusion is not supported by any finding of fact. There is no showing the Manildis were insolvent. On the contrary, when the Receiver settled his claim against them, they paid nothing and excess funds were returned to them. [Clk. Tr. p. 88, lines 12-28.] The uncontradicted evidence showed that Manildi had substantial excess assets. [Ex. 1, p. 3; testimony of Mr. Goldman, his attorney, Rep. Tr., Nov. 14, 1966, p. 65,

line 26 to p. 66, line 3, and p. 66, line 16 to p. 67, line 2.]

It is apparent from the above that the lower Court's decision was not based on the proposition that the appellant knowingly acted against the interests of the receiver.

The Referee himself pointed this up in his comments appearing in the Reporter's Transcript of the June 9, 1966 hearing. The Referee stated:

> "I am not too concerned about the fact that Mr. Grodberg did represent the Trustee (sic) on any matter where there was a specific or an adverse interest, *I don't think that he did that.* The point I am trying to get at is, what is the effect of representing—let's assume for the moment—of in fact representing an adverse interest even though you might not know about it? That is what I am getting at." (emphasis supplied.) [Rep. Tr., June 6, 1966, p. 41, lines 8-15.]

Of especial importance is the fact that the one case cited by the Referee in support of the position ultimately taken by him in this regard, and which case was quoted approvingly and at length by him in his Memorandum Opinion [Clk. Tr. pp. 150-151] has, since the rendering of said Opinion, been reversed by a higher court. *In re Byrns, Inc.,* 260 F. Supp. 442 (E.D. Va., 1966); *reversed, Fine v. Weinberg,* 384 F. 2d 471 (4th Cir. 1967).

In his "Memorandum re Application for Compensation, etc." [Clk. Tr. p. 150, line 26] the Referee states that

> "the case of *In Matter of W. T. Byrns, Inc.,* 260 F.Supp. 442, points up the proposition that a discovery of an adverse position, even though made after the rendition of services, will prevent the payment for such services."

After quoting at length from the decision in said *Matter of Byrns,* the Referee concludes at page 14, lines 4 through 8 of his said Memorandum:

> "It would be my view that an attorney who represents one or more general creditors takes the risk of the penalties imposed by General Order 44 (11 USCA following Section 53) if, thereafter, adverse positions should develop in respect to any of the claims represented by him."

Appellee's Brief states that "we feel compelled to bring to the Court's attention" the recent case of *Fine v. Weinberg,* 384 F. 2d 471 (4th Cir., 1967), which Appellee's Brief concedes now "appears contrary in philosophy" to the contentions urged in said Brief in support of the Referee's position just described. However Appellee's Brief does not point out that *Fine v. Weinberg* reversed the District Court holding previously made in said case *sub nom. In the Matter of W. T. Byrns,* upon which, as above stated, the Reeree and apparently the District Court so relied in reaching the decision which they did.

The Court of Appeals in *Fine v. Weinberg* held that there is no inherent conflict of interest arising from the relationship between a bankrupt corporation and its president and sole shareholder, such as to constitute a prohibition against the same attorney representing, at the same time, said president and sole shareholder on the one hand, and the trustee of the bankrupt corporation (under a deed of assignment) on the other hand. Such an attorney was allowed reasonable com-

pensation for services rendered to such trustee out of assets of the estate of the debtor corporation in its subsequently ensuing bankruptcy proceedings.

The court, in holding that he was entitled to such compensation, stated:

> "We accept and fully approve the teaching of Canon 6, (of the American Bar Association) yet we think it of doubtful application here. Louis B. Fine (the attorney) did not place himself in a position of conflict between the corporation and the creditors under the deed of assignment. When the possibility of conflict grew into reality, he promptly withdrew his own and his firm's representation of any conflicting interest."

Accordingly, the appellate court ordered that his fees be allowed, and reversed the District Court holding of *In re W. T. Byrns, Inc.,* 260 F. Supp. 242 (E.D. Va. 1966). *Fine v. Weinberg,* 384 F. 2d 471 (4th Cir. 1967).

Adherence by the Referee and the District Court to the erroneous view of *In re Byrns* incidentally has a further deleterious result with respect to General Order 44. "Shall have represented," even if unknowingly, as interpreted by the Referee and adopted by the District Court, would render meaningless the qualification "to the best of petitioner's knowledge" for the requirements in the Attorney Affidavit.

III.

In Declaring a Forfeiture by Appellant of All Fees Earned as the Receiver's Attorney in Unrelated Matters in This Estate, the Lower Court Abused Any Discretion It May Have Had Under General Order 44, and the Cases Cited by the Appellee Are Clearly Distinguishable.

Even if an attorney for a receiver "shall have represented any interest adverse to the receiver . . . *in any matter upon which he is employed for such receiver,*" which, as shown above, was not the situation in the case at bar, nevertheless General Order 44 does not "require" disallowance of all fees earned by such attorney as urged in Appellee's Brief and concluded by the Referee and the District Court. [Concl. of Law 5.] General Order 44 expressly makes disallowance purely discretionary, by the use of the language "the court *may* deny the allowance of any fee to such attorney". (Emphasis added.)

It has been held that even where a theoretical conflict generally existed, an attorney should not be deprived of compensation for services where he did not in fact work against the interests of the estate. *In re Barceloux,* 74 F.2d 288, 294 (9th Cir. 1935).

In appellee's citation of a number of cases in his Brief, appellee has confused said permissive authority granted by General Order 44 with the mandatory provisions of a separate and distinct section of the Bankruptcy Act, to wit: Section 62d of the Bankruptcy Act. In prohibiting the practice of splitting fees in bankruptcy proceedings, Congress provided in said Section 62d:

> "If satisfied that the petitioner has, in any form or guise, shared or agreed to share his compensation or in the compensation of any other person con-

trary to the provisions of subdivision c of this Section, the court *shall* withhold all compensation from such petitioner." (Emphasis supplied; Bankruptcy Act, Section 62d.)

Thus, a number of the cases cited by appellee in his Brief must be distinguished for the simple reason that they involve an application not of the discretionary provisions of General Order 44, but on the contrary, invoked the mandatory provisions of the fee-splitting ban of Section 62d. Such was the case in *Albers v. Dickinson,* 127 F. 2d 957 (8th Cir. 1942); *Weil v. Neary,* (1929) 278 U.S. 160, 49 S. Ct. 144, 73 L. Ed. 243; and *Stratton v. New,* 51 F. 2d at 984 (2nd Cir. 1931).

Thus, one of the books of authority cited in Appellee's Brief in pointing out the discretionary aspects of General Order 44 emphasizes that said discretion should be exercised fairly, rather than harshly.

> "General Order 44 does not make forfeiture of compensation or expenses mandatory. Where the attorney for a receiver or trustee has represented an adverse interest without disclosing it, the court *may* disallow compensation or reimbursement, or both . . ." (3A Collier on Bankruptcy 1471; emphasis added.)
>
> "Altogether it would seem that the careful distinction drawn by the law between mandatory (62d) and discretionary forfeiture (General Order 44) should be duly respected. Unless local rules expressly surrender their discretionary powers as to the particular case by adopting a general and unconditional mandatory rule declaring allowances forfeited for contravention of the rules relating to the appointment of attorneys for the estate, compensation for beneficial services actually rendered

> should not be disallowed where at least the spirit of General Order 44 was honestly complied with. In fact, denial of compensation or reimbursement is a sanction distinctly punitive in character and should be reserved to cases warranting a moral censure. . . ." (3 A *Collier on Bankruptcy* 147.)

An instance where denial of all fees was compelled by reason of such a mandatory local rule is cited in Appellee's Brief namely, *Stratton v. New,* 51 F.2d 984 (2nd Cir., 1931). Local Rule 4 of that court prohibited attorneys for an officer of the bankrupt from also representing a receiver, or moving for the receiver's appointment. This had been violated and such rule provided that no such attorney should "receive any compensation". No such local rule is involved in the case at bar.

Other cases cited by appellee, unlike the case at bar, also involved situations where the claim of a creditor was directly and necessarily under known attack by the receiver or trustee by whom the creditor's attorney was also employed. Thus, *In re Westmoreland,* 270 F. Supp. 408, 411 (D. Ga. 1967) was a case where the attorney for the debtor also represented a corporate creditor claimant in the same proceeding. This is an inherently conflicting relationship, which *ipso facto* disqualifies dual representation, and is not excepted under Section 44 of the Bankruptcy Act, which on the contrary permits dual representation of both the receiver and a general creditor, as in the present case.

Although Appellee's Brief contends that certain of the cases cited in Appellant's Opening Brief are distinguishable because they involved Chapter X proceed-

ings, the case of *Woods v. City Nat'l. Bank & Savings of Chicago*, (1941) 312 U.S. 262, 61 S. Ct. 493, 85 L. Ed. 820, relied upon by Appellee also was a Chapter X proceeding. Said case, along with *In re Woodruff*, 121 F. 2d 152 (9th Cir. 1941) has already been distinguished in Appellant's Opening Brief at pages 26 through 31 thereof, to which reference is again made. Among other things, in said cited cases, at the time of appointment, there were existing conflicts between the estates and the respective attorneys' creditor clients, which disputes were already in progress and fully known, and not, as in the instant case, as yet unknown "possible" conflicts which might arise at some future time after the dual representation was undertaken.

The cases of *Matter of Eureka Upholstering Co., Inc.*, 48 F. 2d 95 (2nd Cir. 1931); *Albers v. Dickinson*, 127 F. 2d 957 (8th Cir. 1942) and possibly *Weil v. Neary*, (1929) 278 U.S. 160, are cases distinguishable in that in said instances there was no initial Order of the Court actually appointing the attorney claiming fees as attorney for the trustee or receiver. Such attorneys, being volunteers without official status, are, of course, ineligible for compensation from the bankrupt estates. Appellee's Brief makes much of the strong language used in the last-mentioned case, which arose in reference to the denial of fees under Section 62d. It should be noted, however, that the Chief Justice was applying said strong language particularly to the evils of fee-splitting, upon the basis of which denial of fees is mandatory. In spite of this, it has elsewhere been noted, in respect to *Weil v. Neary, supra,* that the Supreme Court nevertheless in fact did not deny all com-

pensation to the attorneys in the case. This is pointed out in *Crites, Inc. v. Prudential Ins. Co.,* 134 F. 2d 925 (6th Cir. 1943), where it was held that where the party complaining of the allowance of fees to said attorneys from the estate had stood by for years doing nothing about the active representation by the attorneys of opposing interests, even where the attorneys and the receiver had a fee-splitting arrangement, the court, having in mind that *Weil v. Neary, supra,* did not totally disallow compensation, permitted partial compensation for beneficial services rendered.

A fortiori then, the further comment appearing in Collier on Bankruptcy is here appropriate:

> "Even when it has been thought that a creditor's attorney represented an interest adverse to the bankrupt estate, it has usually been held that such dual association would not operate to deny him fair compensation for services which inured to the benefit of the estate." (*2 Collier on Bankruptcy 1686.*)

Reference has already been made in Appellant's Opening Brief to the cases of *Item Lab* (at pp. 38-41), *Cal-Neva Lodge* (Appendix A, and pp. 24-26, and 41-42), *Chicago & Westtown Railway* (at pp. 58-60), and *In re Philadelphia & Western Railway* (at pp. 29-31, and 60), which are relevant to this subject.

Examination of his Application for Attorney fees, [Clk. Tr. pp. 94-130] wherein Appellant sets forth his services rendered, which are in matters unrelated to the Manildis, amply demonstrates that the reasonable value thereof found by the Referee to be in the amount of $12,500.00 is fully sustained. [Find. 19.] The lower court was not "required" to deny all fees, as it con-

cluded, and it is utterly unconscionable and an abuse of discretion on the basis of the fiction the trial court envisaged to deny compensation for the said unrelated services for which the petition was filed. Appellee's Brief, and the Findings and Conclusions of the Court do not and cannot point to a single thing done or omitted by Appellant which in any way was intended to, or did, adversely affect the Receiver. Note also that the Referee expressly stated: "I think, as far as I can see, Mr. Grodberg did conscientiously what he thought he should do. . . .". [Rep. Tr., June 9, 1966, p. 41, lines 17-18.]

There is no question that appellant's representation of a guarantee creditor was known to the Referee, the Receiver, the attorney for the Creditors' Committee and special counsel for the Receiver, and that this was related in open court. [Rep. Tr., June 9, 1966, p. 35, line 24, to p. 36, line 7.] Nevertheless, the Receiver and the Referee sat back and suffered appellant to proceed to render the voluminous, weighty, difficult, and unrelated services which he did render for a period of years thereafter, without once raising any objections or even comment at all by them, or anyone else, to his continuing to represent the Receiver in said matters. Not until the hearings upon appellant's Application for Fees were held was the slightest intimation ever made by anyone at all that appellant allegedly had technically or otherwise represented an interest adverse to the Receiver. It is unthinkable that the debtor's estate should be so unjustly enriched and the appellant caused to suffer so drastic a forfeiture of fees for unrelated matters as results from the lower Court's decision herein.

It undoubtedly is true that a court cannot be estopped. Yet in considering whether there has been an abuse of discretion, equitable considerations must be weighed.

If the decision of the lower Court is permitted to stand, it will do more than work a gross inequity upon appellant individually. It will have the result of discouraging attorneys representing creditors from undertaking representation of a receiver or trustee, contrary to the intent of Congress to encourage the same through the amendments to Section 44 of the Bankruptcy Act and to the corresponding amendment to General Order 44 made shortly thereafter. The reason for this simply is that at any time even after the attorney has rendered services for a long period of time, anyone who regarded the attorney's actions as too forceful or felt otherwise unhappy would readily be enabled to cause all his compensation to be forfeited. For according to the lower Court's decision in this case, all such a person need do would be simply to assert, regardless of the validity thereof, a contention that a creditor's claim represented by that attorney was somehow subject to attack. The need for the Receiver to investigate the matter, which necessity theoretically would always have been present according to the thinking of Appellee's Brief and the lower Court's decision, would constitute "an actual, if not yet known" conflict of interest between the Receiver and that creditor, and this would "require" disallowance of all compensation to the attorney. The net result of this would be to close the windows of the bankruptcy court to the fresh air of active creditor participation through their respective counsel.

Conclusion.

It is respectfully submitted that it is both in the interests of justice and in the interests of advancing sound judicial administration that the Judgment of the District Court be reversed and that Appellant be allowed the reasonable value of his services as Attorney for the Receiver, found by the Referee to be in the sum of $12,500.00.

Respectfully submitted,

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